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In the

Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD A. HOLMAN,

Petitioner,

v.

L. METCALFE WALLING,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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February 1, 1989

Questions Presented

1. Are the new low standards adopted by the court of appeals to sanitize and launder the deliberately false representations of counsel to the trial court, and to preclude further inquiry compatible with (a) the need to maintain the integrity of the judicial process and public confidence therein; (b) the standards applied by this Court in *Hazel-Atlas Glass Co. v. Hartford Empire*, 322 U.S. 238 (1944), *Shawkee Manufacturing Co. v. Hartford Empire*, 322 U.S. 271 (1944) and *Taylor v. Illinois*, 108 S.Ct. 646 (1988); (c) decisions on questions involving fraud on the court in other circuits; and (d) the need to maintain orderly cost-effective procedures in the administration of justice?

2. Was it proper for the court of appeals to sanction the trial court's departure from the accepted and usual course of judicial proceedings by allowing a party to avoid placing a key witness on the stand to testify in open court and be cross-examined when the trial court said that departure was based on the representation by counsel for respondent—later conclusively proved to be false—that the witness was unable to attend?

3. Was the petitioner deprived of his Fifth Amendment right to due process of law and his Seventh Amendment right to trial by jury when the trial court imposed personal liability on petitioner solely based on stock ownership and the court of appeals affirmed that liability on a different theory which necessarily assumed a set of facts never submitted to the jury?

4. Was the petitioner deprived of his Fifth Amendment right to due process of law and his Seventh Amendment right of trial by jury when the court of appeals dismissed the cause of action on which petitioner had been held liable by the jury and based petitioner's liability on a different theory which had been rejected by the trial court, a theory which was never submitted to the jury and a theory where liability and defenses necessarily involved substantial additional fact questions never submitted to the jury?

5. Does the public interest in maintaining the integrity of the judicial system mandate a closer scrutiny and a searching substantive inquiry where there is compelling evidence of tampering with the administration of justice?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Richard A. Holman[2] respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this proceeding on September 19, 1988 (timely motion for rehearing *in banc* denied on November 3, 1988).

[1] The caption contains the names of all parties below, except for Mary Holman, whose dismissal as a defendant by the district court was upheld by the court of appeals, and Wall Street Reports & Intelligence Bulletin, Inc., which is filing a separate petition.

[2] Petitioner Richard A. Holman, who appeared and argued *pro se* before the United States Court of Appeals for the Second Circuit, is an attorney at law, duly admitted to practice in the courts of the State of New York and the Southern District of New York. Petitioner is also the Editor and Publisher of *Wall Street Reports*, a publication of the corporate petitioner, as well as the Editor and Publisher of *The Wall Street Transcript* and *The Diplomatic World Bulletin*. Petitioner did not appear *pro se* in the trial court, but was represented by counsel.

Opinion Below

The opinion of the Court of Appeals for the Second Circuit, reported at 858 F.2d 79, appears in the Appendix hereto at 1a.

Jurisdiction

The opinion of the Court of Appeals for the Second Circuit was entered on September 19, 1988. A timely petition for rehearing *in banc* was denied on November 3, 1988 (1b). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Constitutional Provisions Involved

The Fifth Amendment to the United States Constitution: " . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . . ".

The Seventh Amendment to the United States Constitution: "In suits at common law . . . the right of trial by jury shall be preserved . . . ".

Statement of the Case

This is a diversity action brought against petitioner and others for alleged conversion of items of personal property during the period when the petitioner rented respondent's house in Bedford, New York.

The complaint was filed on or about March 26, 1984, and was assigned to Hon. Kevin T. Duffy. On July 10, 1985, a consent pre-trial order was signed. On April 2, 1986, the action was reassigned to Hon. Miriam G. Cedarbaum. Trial commenced on March 25, 1987, before Hon. Charles M. Metzner. The reassignment to Judge Metzner is dated March 26, 1987.

The gist of respondent's claim as developed at the trial, and as the judge presented it to the jury, was that the petitioner converted the property in question by means of

a tag sale conducted at the premises that had been rented by the corporate petitioner, and occupied by this petitioner, for some eleven (11) years.

The tag sale theory of the case and any facts relating to an alleged tag sale were totally absent from the pre-trial order. This theory of the case turned solely on the deposition testimony of one witness whose deposition the trial court permitted respondent to read to the jury over objection, without any inquiry and based on the representation of respondent's counsel that the witness was unable to attend the trial.

At the trial, to avoid placing Mrs. Bellotti—the single most important witness for respondent—on the witness stand before the jury and subject to cross-examination, respondent's attorney represented to the Court that Mrs. Bellotti was "a person who is unable to attend because of illness".

Respondent's attorney's representation, in open court, that Mrs. Bellotti was "unable to attend because of illness" was a shocking fraud upon the Court perpetrated for reasons which become obvious upon an examination of the record of this case. Mrs. Bellotti had walked in and out of another courthouse where respondent's attorney took her deposition just four months before trial.

At her deposition, Mrs. Bellotti testified she was an active businesswoman who owned and operated an antiques shop and attended a great many tag sales. Just three weeks before trial here she received a telephone call from respondent (himself an attorney admitted in the Southern District) who tried to get her to change her anticipated court testimony. This occurred after Mrs. Bellotti's return from Florida where she played golf, among other activities.

It was during that telephone conversation that respondent learned from Mrs. Bellotti that she had not attended any tag sales at the house rented by petitioners.

It is now clear why respondent went to such lengths to avoid calling Mrs. Bellotti, who was a questionable witness from the start.

First, there is absolutely no reference to her or even to an alleged tag sale in the consent pre-trial order. Respondent's counsel claimed that Mrs. Bellotti was discovered by his investigator on Aug. 6, 1985.[3] In the trial, after defense had rested, respondent took the stand and produced a letter he claimed he had written in the fall of 1985 to his counsel, which letter gives rise to the strong inference that it was the respondent who "discovered" Mrs. Bellotti in the fall of 1985.[4]

Mrs. Bellotti's identity and the so-called "tag sale theory" was kept under wraps by respondent's counsel for over a year, and only revealed when trial before Judge Cedarbaum appeared imminent. It is clear why this was done and why it was so important for respondent to keep Mrs. Bellotti off the stand and away from any possible cross examination by the petitioner in front of the jury. When Mrs. Bellotti talked about attending a tag sale at the Walling house, it was obvious to the respondent that she was not talking about the house that had been rented by petitioners.

In fact, there was not one Walling house on Millertown Road in Bedford, New York, but two Walling houses. The Wallings had moved to Bedford in 1948, at or about the same time that Mrs. Bellotti had come to Bedford. Mrs. Bellotti stated she and her husband came there "after the

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[3] Petitioner unsuccessfully sought to get the name of the investigator to learn, among other things, what Mrs. Bellotti had said to the investigator about the Walling house, the tag sale, and precisely when she had said it.

[4] Whatever the date was, even though respondent's counsel wrote to Judge Duffy on the day after his claimed discovery of Mrs. Bellotti and after the pre-trial order and the list of witnesses had been closed, no mention was made of her in the letter to Judge Duffy.

war," clearly referring to World War II. Walling house #1, which the Wallings occupied from 1948 for almost 20 years, was located at the corner of Stonehill Road and and Millertown Road with its driveway entrance off Millertown Road.

Walling house #2 was a house the Wallings occupied after they occupied Walling house #1. They occupied house #2 for about a year (in or about 1968) before renting it out. It was Walling house #2 that petitioner rented.

When Mrs. Bellotti was talking at length about knowing the Wallings, when their children were growing up together, contacts at the P.T.A., and talking about knowing where the Wallings lived, it was clear beyond any possible doubt to respondent that she was talking about the 1950's and about Walling house #1.

The question for respondent and his counsel was whether petitioner would discover the fact that there were indeed two Walling houses. Further, respondent and his counsel knew that there had indeed been a tag sale at the "Walling house" but it was a tag sale run at the Walling house #1 by the people who had bought that house from the Wallings and had subsequently sold it in the late 70's or early 80's. It was clear to the respondent that Mrs. Bellotti, in talking about a tag sale at a Walling house, had in mind the tag sale run by the Long family (the purchasers of the Walling house #1) at Walling house #1.

The trick for respondent's counsel was to keep this away from the petitioner and from the jury.

The carefully concocted plan was to delay bringing the Bellotti name forward until the last possible moment. The second part of the plan was to take a deposition from her where she talked loosely about a tag sale at "the" Walling house and then keep Mrs. Bellotti off the stand in open court to protect against the possibility that the petitioner would discover the true facts before trial. Mrs. Bellotti's

name never appeared on any written lists of witnesses, nor do we find any written notification that she would actually be called as a witness. During the time when the case was assigned to Judge Cedarbaum, petitioners moved for summary judgment, dated January 23, 1987, about two months before trial. There is no mention of Mrs. Bellotti or the tag sale in respondent's opposition to that motion.

The Court of Appeals held, "Plainly, there was no such fraud, for the district court was aware that her infirmity was disputed." (5a) Petitioner disputed the claimed unavailability or inability of the witness to attend trial, not whether she had any illness or complaint in common with tens of millions of other citizens. The witness said merely that with her arthritis she had difficulty climbing steps.

When petitioner's counsel disputed the claim "unable to attend," respondent's counsel was silent regarding all the other relevant facts he knew. Respondent's attorney knew that Mrs. Bellotti was well and able to attend. He had seen her at Justice Court in Bedford, New York, at her deposition in October 1986. He knew she walks unaided, *i.e.*, without cane or other assistance. He knew that she was able to walk into the Justice Court and that she was able to attend to her business as an active antiques dealer in Bedford, New York, and elsewhere. He knew she conducted her business from her store in Bedford, not from her home. He knew she drove around to tag sales and had testified at her desposition that she could not recall the date of the alleged tag sale because "we go to so many sales."

At the trial, the following colloquy occurred:

> MR. LYMAN: Yes, your Honor, this is the deposition of Ida C. Bellotti.
>
> THE COURT: Ida C. Bellotti.
>
> MR. O'DWYER: I object to it, your Honor.

THE COURT: What grounds?

MR. O'DWYER: There is no reason—Ms. Bellotti is available.

Following the objection, respondent's counsel represented to the Court that the deposition should be read because Mrs. Bellotti "was unable to attend because of illness."

Petitioner's counsel informed the trial court that he was reliably informed that she was playing golf recently and further put the court on notice that petitioners had an affidavit from her in which she made clear that her deposition testimony did not pertain to the Walling house which petitioners had rented.

The trial judge specifically relied on the false representations of respondent's counsel. In fact, he told the jury: "During plaintiff's preparation [*sic*] of his case, he read the testimony of Mrs. Bellotti. That was permitted on the representation that she could not appear here personally to testify from the witness stand."

Respondent's strategy was calculated to force petitioner to subpoena Mrs. Bellotti to the stand as part of petitioner's case. As respondent's counsel undoubtedly anticipated, this tactic would and did give respondent the opportunity to wait until defense had rested to introduce hearsay testimony which petitioner had no chance to rebut. It was this hearsay testimony—relating to whether Mrs. Bellotti attended a tag sale at the Walling house occupied by petitioner—that was the main subject of inquiry by the jury during their deliberations. Respondent's counsel knew that petitioner would have no opportunity to show the house Mrs. Bellotti knew as the Walling house was the house respondent had occupied for almost 20 years and not the house occupied by petitioner and respondent's counsel further knew that the purchasers of Walling house #1 had run a tag sale at that house in the late 1970's or early 1980's.

The court of appeals dismissed the conversion claims as barred by the statute of limitations but held petitioner liable on a contract claim never submitted to the jury. (7a)

Under instructions from the trial judge, the case was submitted to the jury and summed up to the jury on a conversion theory, solely on the basis of a tag sale conducted by or on behalf of petitioner.

Under New York law there are significant questions of fact not submitted to this jury which must be decided in connection with a bailee's liability in contract for bailed goods. Thus, numerous fact questions would necessarily arise with respect to petitioner's liability under contract theory of bailment. The jury made no findings with respect to fact questions relating to the existence of an agreement for bailment, the property subject to such an agreement, termination of the contract by the bailor or bailee or conduct by bailor which made performance impossible, among other issues.

None of the elements of a bailment contract were presented to the jury for its determination. There were no findings as to the formation of a bailment contract, its terms and conditions or, most significantly, defenses petitioner had with respect to its liability for alleged breach of this agreement.

For example, there was no determination as to the property allegedly subject to the bailment. Indeed, pursuant to the lease certain areas of the premises were under lock and key and reserved exclusively to the respondent. No notice was given to petitioner with respect to items locked away, as the lease only applied to the house *as shown*. There is no dispute that the inventory was not made part of the lease and thus petitioner had no notice as to the exact objects of the bailment or indeed that any bailment existed at all. It was for the jury to determine whether a bailment contract was entered into and what property in particular areas of the premises was included in that contract. In fact, the "inventory" was never revealed to petitioner or corporate petitioner until after suit in 1985, about 14 years after the lease started, over 3 years after it ended.

It was a violation of the Fifth and Seventh Amendments for the circuit court to determine these fact issues.

The understanding of the parties as to the contract is a fact question which was required to be submitted to the jury. *Osborn v. Cline*, 263 N.Y. 434 (1934) (property subject to bailment question for the jury); *Crosby v. 20 Fifth Avenue*, 173 Misc. 604 (App. Term, 1940) (whether property in locked trunk is deemed bailed question of fact for jury).

Another question: if a bailment existed, was petitioner's performance rendered impossible in whole or in part by respondent's tresspassory conduct. Respondent testified that he made numerous visits to the premises during the lease period and removed items therefrom. Additionally, various family members visited the premises for the same purpose and removed items. All this occurred without petitioner's permission without the presence of petitioner. Respondent did not leave lists of what he took. Where respondent's conduct renders performance of the contract impossible, petitioner cannot be held liable. These were questions of fact for the jury to determine. *N.Y. State Energy Research Development Corp. v. Nuclear Fuel Services, Inc.*, 561 F.Supp. 954 (W.D.N.Y. 1983).

Additionally an issue arises with respect to termination of the bailment contract in or about March, 1978. Under New York law, the bailee can terminate his custody. The jury was required to pass on questions of fact relating to appellant's termination of the bailment. Petitioner testified that he requested that respondent remove all of his possessions from the premises in March, 1978 and respondent agreed. Respondent testified he removed certain items in or about August, 1979. It is a question of fact for the jury to determine whether and when the parties terminated the bailment contract.

The circuit court's ruling necessarily means that it resolved every disputed question in favor of respondent.

New York State Real Property Law compelled the inclusion in the lease of clauses favorable to petitioner. The clauses were improperly withheld from the jury. Thus, the jury made findings using a lease that was spurious, that had significant clauses omitted and withheld from them. They formed impressions of the petitioner and respondent based upon a misleading document. When it came to the questions as between the petitioner and respondent—who had breached the lease by refusing to repair the roof, who was evading his responsibilities, who was giving the true picture as to those responsibilities—the jury based its determination on a document from which key provisions favorable to the petitioner had been kept from them by the trial judge.

The jury finding that petitioner was liable for damages was based on a spurious lease with clauses withheld and necessarily poisoned and prejudiced their minds against petitioner-tenant which carried over into all of the findings by the jury.

The court of appeals' holding on the question of individual liability of petitioner was similarly based on questions of fact never submitted to the jury, which the Court recognized where it stated, "[the evidence presented at trial] supports Judge Metzner's implicit finding that Holman and Wall Street Reports were jointly liable . . . " [6a].

REASONS FOR GRANTING THE WRIT

POINT I

Permitting the circuit court decision to stand will necessarily diminish public confidence in the federal judiciary and seriously undermine its efficient and effective operation.

The Court should apply to this case the vigorous standards enforced in *Taylor v. Illinois,* 108 S.Ct. 646 (1988), and denounce in the sharpest possible manner and impose the severest sanctions available for an attorney's willful and blatant fraud on the court. The mere fact that, in *Taylor,* the attorney represented a criminal defendant and here, a civil litigant, should present no basis to distinguish these otherwise remarkably parallel cases.

In the instant case, the attorney for respondent made misrepresentations to the court so that a crucial witness would not be subject to cross-examination in open court. In *Taylor,* the attorney delayed identifying a witness pursuant to a discovery request for the purpose of minimizing the effectiveness of cross-examination and the ability to adduce rebuttal evidence. *Taylor v. Illinois,* 108 S.Ct. at 655.

Both cases involve an attorney's lying to the court to reduce effective trial access to his witness. In *Taylor* the witness' "testimony rather dramatically contradicted defense counsel's representations to the court." *Id.* at 650. In this case when the witness walked into the trial court unaided, she just as dramatically and even more conclusively contradicted respondent's counsel's representations to the trial court.

In this case, the trial judge made it absolutely clear that he relied on the representation of respondent's attorney in permitting the deposition to be read.

The trial judge stated:

> During plaintiff's preparation [*sic*] of his case, he read testimony of Mrs. Bellotti. That was permitted on the representation that she could not appear here personally to testify from the witness stand.

The statement by the circuit court, that "the district court based its ruling" on Mrs. Bellotti's testimony (A5) is a mischaracterization of the record which ignores this statement by the trial judge that he relied on counsel's representation.[5]

In putting its seal of approval on the carefully planned and executed scam of respondent's counsel, the court of appeals makes it open season for all litigants who seek tactical advantages by purposefully violating the rules for orderly judicial proceedings.

If this decision is permitted to stand, it will substantially burden the administration of justice, spawn unnecessary litigation and create uncertainty as to the finality and integrity of judicial proceedings.

Cross examination has been developed as a powerful tool to get at the truth. Clearly counsel would prefer to present their witnesses by deposition and avoid hostile cross examination in open court. This decision, by laundering an attorney's blatant misrepresentation to the trial judge (expressly relied on by that judge), opens the floodgates for counsel who are wiling to make misrepresentations to gain a strategic trial advantage. If the adversary fails to spot the misrepresentation, counsel has scored a major victory. And, if the circuit court's standard is left intact, that attorney will suffer no adverse consequences for his tampering with the administration of justice.

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[5] At her deposition, she said her arthritis made climbing stairs difficult.

According to the court of appeals' ruling, if the adversary disputes the claimed inability to attend and loses, then the misrepresenting counsel is home free. This insulates the attorney from sanctions and is an open invitation to disreputable counsel to take such a chance.

Cleary this is a giant step backwards. Rule 11, among other rules, was adopted and strengthened to insure compliance with the highest standards of attorney honest dealing with the court, to reduce the cost of litigation, to insure that representations are well grounded in fact and warranted by existing law. Strict adherence to the rules of evidence and the rules of procedure are necessary to maintain the very integrity of the judicial system and public confidence in the system. See, for example, *United States v. Nixon*, 418 U.S. 683 at 709. In *Taylor*, at 108 S.Ct. 653, this Court noted:

> The adversary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case. The trial process would be a shambles if either party had an absolute right to control the time and content of his witnesses' testimony.

Orderly and fair presentation of facts and evidence is not only necessary to maintain integrity, it is necessary to control the burgeoning costs of litigation and to help control the costs of judicial administration.

> No fraud is more odious than an attempt to subvert the administration of justice.
> Justice Roberts, dissenting in *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 251 (1944), *reh. denied*, 322 U.S. 772.

When Mrs. Bellotti walked into Judge Metzner's courtroom, the fraud was exposed. At that point the complaint should have been dismissed forthwith, and severe sanctions imposed. The preservation of the integrity of the federal judicial process demanded that this action be taken. *See, Hazel-Atlas,* 322 U.S. 238, 64 S.Ct. 997 (1944); *Universal Oil Products Company v. Root Refining Company,* 169 F.2d 514 (3d Cir. 1948).

The fraud in this case goes much further than the fraud which was exposed and denounced in *Hazel-Atlas.* First, the fraud here concerned the most significant witness in the case; the only witness on the alleged tag sale. Indeed, the tag sale was recognized by the judge as the central factual question in the case. In *Hazel-Atlas* the fraud related to mislabeling the authorship of a published article, merely one of the many items submitted in support of a patent application.

Second, in *Hazel-Atlas,* no challenge as to the authorship of the article was made in open court. Of course, here, the mislabeling occurred in open court, in the presence of the jury by an officer thereof, after challenge.

Third, in *Hazel-Atlas* it was unclear whether the mislabeling was basic to the outcome of the case. By contrast, here counsel's statement that Mrs. Bellotti "was unable to attend due to illness" was made for the sole purpose of winning this case and the fraud was a key factor in the outcome.

The central issue is not merely what happens to these litigants, but what this Court will do to protect the integrity of the Federal judicial process. As this Court stated in *Hazel-Atlas:*

> Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single

> litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. *The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.* (emphasis added).

Hazel-Atlas, supra, 322 U.S. at 246, 64 S.Ct. at 1001.

In *Hazel-Atlas,* this Court refused to allow the circuit court to ignore the fraud. The courts below should not be permitted to ignore the fraud here.

Here an officer of the court made knowing misrepresentations which subverted the trial and reshaped the entire proceeding. As Professor Moore states in *Moore's Federal Practice Commentary,* no fraud upon the court rivals that committed by an officer thereof. In discussing *Hazel-Atlas,* he observes that:

> [A]n attorney of Hartford was implicated in perpetrating the fraud. We believe that this is important, for while an attorney should represent his client with singular loyalty that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates a fraud upon the court. (footnote omitted.)

7 *Moore, supra,* para. 60.33 at 359.

In both *Hazel-Atlas* and *Universal Oil v. Root Refining, supra,* 169 F.2d at 541, the attorneys involved were disbarred. *See also, Kingsland v. Dorsey,* 338 U.S. 318, 94 L.Ed. 123.

The court of appeals held, "Plainly there was no such fraud, for the district court was aware that her infirmity was disputed." (A5). Petitioner disputed the availability or ability of the witness to attend trial, not whether she had trouble climbing steps.

Far from excusing the fraud of respondent's counsel, the objection voiced by petitioner imposed upon respondent's counsel a duty of full disclosure to the court. His continued concealment only aggravated the fraud. This principle was established in a companion case to *Hazel-Atlas v. Hartford Empire,* where this Court held that the exposure by defendant Shawkee of the deceptive practices of Hartford to the Circuit Court did not mitigate Hartford's wrongdoing. To the contrary, it only aggravated the fraud:

> Hartford can derive no aid from the fact that Shawkee reported to the Circuit Court its belief as to the deceptive authorship of the Clarke article. With that charge on the record, honest dealing with the Court required that Hartford should make a full disclosure of its fraudulent conspiracy. Its failure to do so under these circumstances aggravated the previous deception it had practiced on the Patent Office and the courts.

Shawkee Manufacturing Co. v. Hartford Empire Co., 322 U.S. 271, 273, 64 S.Ct. 1014, 1015 (1944), *reh. denied,* 322 U.S. 772.

Thus, the standards adopted by the circuit court are in square conflict with the prior precedents of this Court.

Continuing further on its erroneous path, the court of appeals held, "Finally, any 'fraud' would have been exposed (and any possible prejudice avoided) when the appellants produced Bellotti in person as their witness." (A5)

The standard to be applied is not limited to the possible injury to the adversary; it is the irreparable harm to the integrity of the federal judiciary. As the Court noted in *Taylor v. Illinois*, 108 S.Ct. at 656:

> "More is at stake than possible prejudice to the prosecution. We are also concerned with the impact of this kind of conduct on the integrity of the judicial process itself."

The fraud on the court practiced by respondent's counsel had as its sole purpose and devastating effect prejudice to petitioner. Knowing that Mrs. Bellotti had discovered that whatever tag sale she had attended, it was not at the house that petitioner occupied, respondent's strategy was calculated to force petitioner to subpoena Mrs. Bellotti to the stand as part of his case. As respondent's counsel anticipated, this tactic would give respondent the opportunity to wait until defense had rested to introduce hearsay testimony which petitioner had no chance to rebut.

It was this hearsay testimony—relating to whether Mrs. Bellotti attended a tag sale at the Walling house occupied by petitioner—that was the main subject of inquiry by the jury during their deliberations.

Respondent's counsel knew that petitioners would have no opportunity to show that the house Mrs. Bellotti knew as the Walling house was the house respondent had occupied for almost 20 years and not the house occupied by petitioner. Respondent's counsel further knew that the purchasers of the 20-year Walling house had run a tag sale in the late 1970's or early 1980's on the stone terrace near the road.

The successful scam of the respondent's counsel was prejudicial in the extreme to petitioner. Respondent's tactics turned the trial upside down. Thousands of other attorneys would no doubt like to do the same, free of sanctions.

Finally, the circuit court's decision is in square conflict with at least two decisions in two other circuits.

In *Rozier v. Ford Motor Company*, 573 F.2d 1332 (5th Cir. 1978), *reh. denied*, the fraud on the court consisted of the failure of Ford's attorneys to disclose the existence of a document which was requested during discovery but which came to their attention only over one month after they had responded to the discovery request, but three days before trial. The Court reversed and remanded with directions holding, in part:

> Ford's misconduct prejudiced the plaintiff by denying her information which might well have reshaped the case she ultimately presented to the jury.

573 F.2d at 1349.

Virgin Islands Housing Authority v. David, 823 F.2d 764 (3d Cir. 1987) is also in conflict with the circuit court's ruling here (Attorney misrepresented another court's decision in oral argument before the district court. Remanded to district court for consideration of appropriate disciplinary action).

The maintenance of confidence and respect of the public at large demands that the Court exercise its supervisory powers herein. This Court should not permit the courts below to ignore or launder the fraud.

POINT II

In making new findings of fact and imposing liability on petitioner on facts and theories not submitted to the jury, the court of appeals deprived petitioner of due process of law and the right to trial by jury in violation of the Fifth and Seventh Amendments.

The constitutional issues under the Fifth and Seventh Amendments were presented to the court of appeals by both this petitioner and the corporate petitioner in separate petitions for rehearing *in banc*, both of which were denied The circuit court deprived petitioner of due process of law and his right to trial by jury by making significant findings of fact *sub silentio* to support a quick disposition of the case.

Permitting this, or any other, appellate court to modify a judgment to hold litigants liable on a theory and set of facts never submitted to the jury puts a dangerous power in the hands of appellate courts, in square conflict with the Fifth and Seventh Amendments to the Constitution.

It may indeed by more convenient for an appellate court to make all the necessary findings of fact to avoid a new trial. It is also, however, a violation of the Constitution.

While the court of appeals felt compelled to acknowledge innumerable incorrect rulings by the trial judge on substantial questions, it sought to neutralize the natural consequence of the trial court's errors with a series of its own explicit and implicit findings of fact.

The circuit court dismissed the conversion claim because the trial court judge improperly ignored the impact of the statute of limitations. The circuit court also dismissed certain damage awards because the trial court ignored the impact of applicable New York property law. The circuit court made its own findings of fact so as to be able to hold petitioner liable on a contract theory. At the same time, the court remanded the damage award to the trial court for recalculation consistent with its rulings

under applicable New York property law. Petitioner submits both constitute a violation of his right to trial by jury.

It is a violation of the Fifth and Seventh Amendments for an appellate court to determine fact issues. *See, Boyle v. United Technologies Corp.*, 108 S.Ct. 2510 (1988) (defenses relating to contract are for the jury to determine). For the court to have ruled as it did is tantamount to a finding that there is not a scintilla of evidence for petitioner on any of the material questions of fact which New York law holds are pertinent on a bailment by contract cause of action. *See, Boyle v. United Technologies Corp.*, 108 S.Ct. 2510, 2519 (June, 1988).

In *Boyle*, the Court held that the Seventh Amendment permits a circuit court to modify a jury verdict without remanding for trial on a new theory only if the evidence would not suffice as a matter of law to support a jury verdict. In other words, if there is a scintilla of evidence on any fact question involved in the new theory it must be submitted to the jury. Indeed, in *Boyle*, since it was not clear whether the circuit court was making any such factual determinations, it was remanded for clarification of this point. In so doing the Court was making clear that any factual determination made by the circuit court would be error. *See Boyle, supra* at 2519.

In affirming liability of petitioner personally, as a sole stockholder of the corporate petitioner, the circuit court cites (A6) a New York case where liability was based on the finding that the corporation was a "dummy" operated for purely personal, rather than corporate ends. No jury made any such finding in this case and nothing in the record would support such a jury finding.

In its new-found approach, the circuit court felt perfectly free to find any facts it cared to. The circuit court appeared determined not to be hampered by the constitutional requirement that facts must be found by the jury.

These errors resulted in a deprivation of due process and the right to trial by jury, and required the judgment to be reversed.

POINT III

This Court should grant certiorari to conduct the closer scrutiny and inquiry the public interest demands where there is compelling evidence of tampering with the administration of justice.

The public interest in maintaining the integrity of the judicial system is of paramount importance, even to the extent of outweighing the Sixth Amendment constitutional rights of a criminal defendant. *Wheat v. U.S.*, 108 S.Ct. 1692 (1988).

Where Sixth Amendment rights are implicated, close scrutiny and a searching substantive inquiry is mandated. *A fortiori,* in cases which involve tampering with the administration of justice, an even closer scrutiny and more vigorous searching substantive inquiry is required. The courts below did neither.[6]

On the undisputed record here, respondent's counsel tampered with the presentation of a key witness by making false representations to the trial judge which the trial judge relied on in giving respondent permission to keep the witness out of court. Regardless of what the circuit court stated in its decision, it is the trial judge himself who stated that the representation was made and he relied on it.

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[6] Petitioner sought a full evidentiary hearing or the right to take depositions after the trial when he learned, for the first time, that respondent had spoken to Mrs. Bellotti before trial commenced after her return from a golfing vacation in Florida. This issue was preserved and briefed on appeal, but ignored by the court of appeals.

The representation that the witness was unable to attend the trial was dramatically and conclusively proved false when the witness, under subpoena by petitioner, walked into the courtroom and took the stand and testified in open court.

Tampering with the presentation of a witness at trial is tampering with the administration of justice, *Taylor v. Illinois, supra,* for which the public has a right to demand the severest possible sanctions because "it is a wrong against the institutions set up to protect and safeguard the public . . . ". *Hazel-Atlas,* 322 U.S. at 246.

Fraud on the court undermines the administration of justice and the integrity of the federal judicial process and is the highest crime and misdemeanor an officer of the court can commit. The "high Crimes and Misdemeanors" that provide the basis for impeachment have been described as follows: "the significant effects of the conduct—undermining the integrity of office . . . " (Staff Report, House Judiciary Comm., "Constitutional Grounds for Presidential Impeachment" [released February 22, 1974]). Therefore, the conduct by an officer of the court which undermines the integrity of the judiciary deserves the severest condemnation.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

RICHARD A. HOLMAN
Petitioner Pro Se
99 Wall Street
New York, New York 10005
(212) 747-9500

February 1, 1989

APPENDIX A—Opinion of the Court of Appeals Dated September 19, 1988.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1314, 1315—August Term, 1987

(Argued June 15, 1988 Decided Sep. 19, 1988)

Docket Nos. 88-7073, -7101

L. METCALFE WALLING,

Appellee-Cross-Appellant,

v.

RICHARD A. HOLMAN, MARY HOLMAN, WALL STREET REPORTS AND INTELLIGENCE BULLETIN, INC.,

Defendants,

RICHARD A. HOLMAN, WALL STREET REPORTS AND INTELLIGENCE BULLETIN, INC.,

Appellants-Cross-Appellees.

L. METCALFE WALLING,

Appellant,

v.

RICHARD A. HOLMAN, WALL STREET REPORTS AND INTELLIGENCE BULLETIN, INC.,

Defendants,

MARY HOLMAN,

Appellee.

Before OAKES, MESKILL, and PIERCE, *Circuit Judges.*

Appeal from a jury verdict awarding plaintiff $45,837 in damages for property injury and loss arising from the rental of residential property. *Held,* plaintiff was entitled to recover contractual damages for property loss. District court also failed to apply New York State's warranty of habitability provision, N.Y. Real Prop. Law § 235-b(1), which bars recovery for certain repairs to residential property.

Judgment affirmed in part, reversed in part, and remanded.

Samuel N. Greenspoon, Grutman, Miller, Greenspoon & Hendler, New York, NY, *for Appellant Wall Street Reports and Intelligence Bulletin, Inc.*

Richard A. Holman, New York, NY, *Appellant Pro Se.*

Cletus P. Lyman, Lyman & Ash Philadelphia, PA, *for Appellee Walling.*

Myles C. Cunningham, New York, NY, *for Appellee Mary Holman.*

OAKES, *Circuit Judge:*

Appellants Richard Holman and Wall Street Reports and Intelligence Bulletin, Inc. ("Wall Street Reports") appeal from a judgment entered by the United States District Court for the Southern District of New York, Charles M. Metzner, Judge, holding them liable for the loss of furniture and other furnishings from a rented home in Bedford, New

York, and awarding L. Metcalfe Walling, the homeowner, damages in the amount of $45,837 plus interest.

Appellants' principal arguments are that the district court erred in allowing the deposition of a witness, Ida C. Bellotti, to be read at trial, and that the evidence was insufficient to support the jury's verdict. Appellants also argue that New York Real Property Law § 235-b(1) (McKinney 1988) prohibits recovery of certain damages related to the residential property, that the district court committed error in not dismissing Walling's action as time-barred under New York's three-year statute of limitations, that the court improperly pierced the corporate veil in holding appellant Richard Holman personally liable, and that the court improperly dismissed appellants' counter-claim as abandoned. On cross-appeal, Walling argues that the district court erred in refusing to charge the jury on defendants' contractual liability and on punitive damages and in dismissing appellee Mary Holman from the suit.

As to the cross-appeal, we find that the district court should have given a jury instruction on contractual liability, but that the jury's verdict was not affected by this failure. On Richard Holman's and Wall Street Reports' appeal, we affirm the judgment below except for certain damages awarded, which we reverse and remand to the district court for recomputation.

FACTS

In July 1971, while L. Matcalfe Walling was living abroad, his son rented his father's furnished house in Bedford, New York, to Wall Street Reports as a weekend residence for the corporation's 100% stockholder, Richard Holman. When the lease expired on September 4, 1972, an informal rental arrangement continued between the parties. Letters negotiating rent increases and other terms of occupancy were directed to Richard Holman personally, and bills relating to the property were paid from both Holman's

corporate accounts (including that of another wholly owned corporation, Wall Street Transcripts) and his personal funds. In 1978 Holman married Mary Holman, who sometimes accompanied him to the Walling residence.

In October 1979 Walling's niece, with his consent, removed some furniture from the house and reported to her uncle that that furniture and a piano remaining in the house were damaged. Walling testified that in 1979, when he last visited the property, he noticed that although the house still contained some of his furniture and part of his collection of objets d'art, other pieces were missing. In 1982 Richard and Mary Holman moved out of the house, leaving it empty except for the damaged piano. The roof had leaked, damaging the parquet floors, and a pool filter had to be replaced.

L. Metcalfe Walling commenced this suit on April 10, 1984, seeking recovery of damages based upon at least two[1] distinct theories: the defendants' contractual obligation to leave the house and furnishings in good repair, and the defendants' conversion of the personal property. Judge Metzner instructed the jury to award damages for injury to the house and to personal property in the possession of the plaintiff's niece if it found that the defendants had breached the lease by failing to surrender items in the same condition as they were received, less reasonable wear and tear. He instructed the jury to award damages for missing personal property if it found that conversion had occurred, but he refused to charge the jury on punitive damages or on contractual recovery for the missing items. The jury found for the plaintiff, awarding a total of $45,837 as follows:

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[1]Walling at times announced his intention to pursue a quasi-contractual claim for the missing items by ratifying a fictitious sale to Holman and suing for its proceeds. *See Baratta v. Kozlowski*, 94 A.D.2d 454, 464, 464 N.Y.S.2d 803, 809 (2d Dep't 1983). We need not discuss this further for the basis of recovery we sanction here leads to the same result, except as to cross-appellee Mary Holman. As to her, however, there has been no request for relief in the event of affirmance.

Breach of Contract

(a) Damage to the parquet floors	$1,950
(b) Damage to the beams and side walls	0
(c) Damage to the pool filter	401
(d) Damage to the glass door	126
(e) Refuse removal	110
(f) Damage to the piano	250
(g) Damage to furnishings in possession of Walling's niece	1,500

Conversion

(a) Damages for missing furnishings and other personal property	41,500

DISCUSSION

Appellants have expended considerable energy attempting to persuade this court that a "fraud on the Court" caused the district court's admission of the deposition of a witness, Ida C. Bellotti, on the ground that she was unable to attend because of infirmity. Plainly there was no such fraud, for the district court was aware that her infirmity was disputed. Appellants' trial counsel, contesting admission of the deposition, claimed to be "reliably informed that she [Bellotti] was playing golf" the previous week. Bellotti, however, testified at her deposition, under oath and in the presence of appellants' counsel, as to the nature of her difficulties, and the district court based its ruling on this testimony. Finally, any "fraud" would have been exposed (and any possible prejudice avoided) when the appellants produced Bellotti in person as their witness. The trial judge was then in a position to observe Bellotti's physical condition and to determine whether sanctions, including striking the deposition from the record, were appropriate. We consider his decision to forego such sanctions dispositive.

Appellants are precluded from challenging the sufficiency of the evidence because they failed to move for a directed verdict at trial in accordance with Fed. R. Civ. P. 50(b). *See Oliveras v. American Export Isbrandtsen Lines, Inc.*, 431 F.2d 814, 816-17 (2d Cir. 1970). We also dispose summarily of appellants' argument that the district court erred in dismissing with prejudice appellants' counterclaim for money expended on repairs. The counterclaim did not appear in the pretrial order, nor was any request made for a jury charge on the claim. Thus, dismissal on the ground of abandonment was proper. *See Schenck v. Bear, Stearns & Co.*, 583 F.2d 58, 60 (2d Cir. 1978).

Next, appellant Richard Holman, noting that the original lease was signed by the corporate defendant, Wall Street Reports, challenges the district court's ruling that he could be held personally liable under the lease for damage to the property. We affirm the district court for two reasons. First, as Judge Fuld wrote in *Walkovszy v. Carlton*, 18 N.Y.2d 414, 418, 223 N.E.2d 6,8, 276 N.Y.S.2d 585, 588 (1966), where "the corporation is a 'dummy' for its individual stockholders who are in reality carrying on the business in their personal capacities for purely personal rather than corporate ends," the stockholders may be held personally liable for corporate debts. *See Brunswick Corp. v. Waxman*, 459 F. Supp. 1222, 1230 (E.D.N.Y. 1978), *aff'd* 599 F.2d 34 (2d Cir. 1979). Here, the use of the corporation to rent a residence for the sole stockholder's use cannot limit Holman's personal liability. Second, the evidence presented at trial showed that Holman personally negotiated extensions of the lease with Walling and supports Judge Metzner's implicit finding that Holman and Wall Street Reports were jointly liable beyond the term of the original lease.

We do not, however, affirm the entire award. Certain damages, namely those relating to the condition of the reality when defendants vacated the premises, as a matter of law are not recoverable by the landlord. New York Real

Property Law § 235-b(1) creates a warranty of habitability in "every written or oral lease or rental agreement for residential premises." This appears to cover—at a minimum—the water damage to the floors caused by a leaky roof. The New York Court of Appeals has interpreted § 235-b as a legislative remedy "to compel . . . landlord[s] to make necessary repairs or provide essential services." *Park West Management Corp. v. Mitchell,* 47 N.Y.2d 316, 325, 391 N.E.2d 1288, 1292, 418 N.Y.S.2d 310, 314, *cert. denied,* 444 U.S. 992 (1979). *See also, e.g., Kachian v. Aronson,* 475 N.Y.S.2d 214, 218, 123 Misc.2d 743, 746-47 (N.Y.C. Civ. Ct. 1984) (warranty covers water leakage). We reject appellee Walling's contention that the warranty is limited to conditions that endanger life, health, and safety, because the warranty extends to maintenance of the premises "in accord with the uses reasonably intended by the parties," *Park West Management Corp.,* 47 N.Y.2d at 325, 319 N.E.2d at 1293, 418 N.Y.S.2d at 315. The district court mistakenly believed that the lease could vary such terms. The statute, however, expressly voids all contractual attempts to make a residential tenant surrender rights under the warranty. N.Y. Real Prop. Law § 235-b(2). Only damage caused by the tenant's "misconduct" is exempt by the statute. *Id.* § 235-b(1). Since the district court did not apply the statute, no determination was made as to the scope of the warranty in this case and its effect on the damages. Accordingly, we remand this issue to the district court for a reassessment of the damages relating to injury to the residential property.

We next address appellants' statute of limitations argument. Under the alternative theory of conversion advanced by Walling at trial and charged by the court, some furnishings were missing or damaged beyond repair in 1979 when he and his niece last viewed the premises, and others were sold at a tag sale held sometime between 1979 and 1982. The district court erroneously concluded that the statute of

limitations began to run in 1982. In conversion actions, however, the statute of limitations ordinarily begins to run when the conversion takes place, rather than when the injured party discovers the injury and makes a demand for the property. *See Al-Roc Prods. Corp. v. Union Dime Sav. Bank*, 74 A.D.2d 834, 834, 425 N.Y.S.2d 525, 526 (2d Dep't 1980) (mem.); *Guild v. Hopkins*, 271 A.D. 234, 244, 63 N.Y.S.2d 522, 531 (lst Dep't 1946), *aff'd*, 297 N.Y. 477, 74 N.E.2d 183 (1947); *Pollack v. Warner Bros. Pictures, Inc.*, 266 A.D. 118, 120, 41 N.Y.S.2d 225, 226 (lst Dep't 1943) (*per curiam*); *cf. Lehman v. Lehman*, 591 F. Supp. 1523, 1527 n.20 (S.D.N.Y. 1984) (only where defendant committed "no overt act of conversion by an unlawful sale or disposition of the property" does statute of limitations begin to run when demand for property is refused). The tag sale and the defendants' removal of property might have started the limitations period running as to some items as early as 1979. The three-year statute of limitations applicable to property actions, N.Y. Civ. Prac. L. & R. 214(4) (McKinney Supp. 1988), would therefore bar tort claims for goods converted before April 9, 1981.

Nonetheless, because the appellants' liability "had its genesis in [a] contractual relationship," *Sears, Roebuck & Co. v. Enco Assocs., Inc.*, 43 N.Y.2d 389, 396, 372 N.E.2d 555, 558, 401 N.Y.S.2d 767, 771 (1977), in the form of a lease, Walling was entitled to elect a contractual remedy for the loss of the missing items and be governed by the six-year contractual statute of limitations. *See id.; see also Video Corp. of America v. Frederick Flatto Assocs.*, 58 N.Y.2d 1026, 448 N.E.2d 1350, 462 N.Y.S.2d 439 (1983); *Baratta v. Kozlowski*, 94 A.D.2d 454, 460-64, 464 N.Y.S.2d 803, 807-10 (2d Dep't 1983).

The election of remedies should have been made at trial at a time within the discretion of the trial judge. *Baratta*, 94 A.D.2d at 464, 464 N.Y.S.2d at 809. As the statute of limitations for contractual actions is six years, N.Y. Civ.

Prac. L. & R. 213(2) (McKinney Supp. 1988), Walling not surprisingly requested the court to charge the jury on a contract claim. As we have said, the district court disregarded Walling's request and charged the jury only on the conversion claim, failing, however, to disallow the time-barred conversion claims. Had the court properly permitted the contractual claim to go to the jury, however, we conclude that the result would be unchanged. Because the court refused to charge the jury on punitive damages, the tort damages awarded to Walling, which were equivalent to the value of the property, were identical to contractual damages for appellants' failure to turn over the items at the end of the lease.

Finally, we conclude that appellee Mary Holman was properly dismissed as a defendant in this case, as she was served more than three years after any alleged conversion of the property, and at no time entered into any contractual relationship with Walling which would permit recovery under the more generous statute of limitations. *Cf. Sears, Roebuck*, 43 N.Y.2d at 396-97, 372 N.E.2d at 558-59, 401 N.Y.S.2d at 771.

Judgment affirmed in part, reversed in part, and remanded to the district court for a recalculation of damages.

APPENDIX B—Order of the Court of Appeals Dated November 3, 1988, Denying Rehearing In Banc.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 3rd day of November one thousand nine hundred and eighty-eight.

L. METCALFE WALLING,

Appellee-Cross-Appellant,

v.

RICHARD A. HOLMAN, MARY HOLMAN, WALL STREET REPORTS AND INTELLIGENCE BULLETIN, INC.,

Defendants,

RICHARD A. HOLMAN, WALL STREET REPORTS AND INTELLIGENCE BULLETIN, INC.,

Appellants-Cross-Appellees.

L. METCALFE WALLING,

Appellant,

v.

RICHARD A. HOLMAN, WALL STREET REPORTS AND INTELLIGENCE BULLETIN, INC.,

Defendants,

MARY HOLMAN,

Appellee.

Docket Nos. 88-7073, -88-7101

Petitions for rehearing containing a suggestion that the action be reheard *in banc* having been filed herein by counsels for the Appellants Wall Street Reports and Intelligence Bulletin, Inc., and Richard A. Holman.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petitions for rehearing are DENIED.

It is further noted that the suggestions for rehearing *in banc* have been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk
By: FRED M. CASSIDY
Chief Deputy Clerk.

Filed Nov. 3, 1988
United States Court of Appeals
Second Circuit
Elaine B. Goldsmith, Clerk